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in the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL.,

Appellants,

vs.

GREGORY SCOTT SCHERER,

Appellee.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE VIOLATION OF CLEARLY ESTABLISHED PRINCIPLES OF CONSTITUTIONAL LAW ABROGATE A STATE OFFICIAL'S DEFENSE OF GOOD FAITH IMMUNITY?

II

IN OCTOBER, 1977, DID CLEARLY ESTABLISHED PRINCIPLES OF DUE PROCESS OF LAW REQUIRE THAT A PERMANENT CAREER CIVIL SERVICE EMPLOYEE, PRIOR TO BEING DISCHARGED, BE PROVIDED WITH SOME NOTICE IN WRITING OF HIS PROPOSED DISCHARGE OR AN OPPORTUNITY TO RESPOND VERBALLY OR IN WRITING TO THE OFFICIAL CHARGED WITH MAKING THE TERMINATION DECISION?

III

IN OCTOBER, 1977, DID CLEARLY ESTABLISHED PRINCIPLES OF EQUAL PROTECTION REQUIRE THAT A STATE AGENCY APPLY ITS PERSONNEL POLICIES EQUALLY, OR COULD AN AGENCY TREAT SIMILARLY SITUATED EMPLOYEES IN A DISPARATE FASHION?

IV

IF CLEARLY ESTABLISHED PRINCIPLES OF DUE PROCESS OF LAW DID NOT REQUIRE SUCH NOTICE OR AN OPPORTUNITY TO RESPOND, MAY A STATE OFFICIAL BE HELD LIABLE FOR COMPENSATORY DAMAGES WHEN HE IS NOT PERFORMING A DISCRETIONARY FUNCTION AND A STATE REGULATION PROVIDING PRE-TERMINATION PROCEDURAL PROTECTIONS HAS BEEN VIOLATED BY THE STATE OFFICIALS?

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INTRODUCTORY STATEMENT

This Court need not address any of the issues posed by the defendant-appellants and the United States.

The appellee, Gregory Scott Scherer, agrees that the District Court erred in declaring unconstitutional a Florida Civil Service statute which could not affect his interests, since he had resigned from state service before the statute had been enacted. Our agreement is detailed at p. 34, *infra*. Therefore, the portion of the District Court judgment addressed to the newly enacted statute's invalidity should be vacated.[1]

The *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), issue posed by the respective questions presented need not be addressed because they proceed from an erroneous assumption. The defendants and the Solicitor General posed nearly identical questions:

> Whether the violation of agency regulation or state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

Brief for Appellants, p. i.

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[1]Resolution of that issue, which is the basis of the Court's appellate jurisdiction in this case, ends the matter. Since the defendants did not seek certiorari review, which could have encompassed both questions they present, no jurisdiction exists to review their immunity claim. See 12 *Moore's Federal Practice* ¶435.01[2] at 6-55-56 (2d ed. 1982), Stern & Gressman, *Supreme Court Practice* 68 (5th ed. 1978) and the discussion in the Solicitor General's Brief at 4, n. 5.

The United States asked:

> Whether the violation of an administrative regulation abrogates a government official's qualified immunity from a constitutional damages suit, even though such conduct did not violate any clearly established constitutional right of the plaintiff.

Brief for United States, p. (I).

Appellee Scherer contends that the conduct complained of *did* violate clearly established principles of constitutional law, and the District Court's initial opinion to that effect was proper for the reasons it advanced and other reasons.[2]

If we are correct, there is no need to reach the "violation of regulation" theory upon which the defendants and the United States have premised their arguments. In case we are incorrect, we have responded to the *Harlow* arguments.

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[2]In addition to the failure to accord any pre-termination procedural protections, the District Court also noted that two co-workers had not been penalized although they engaged in the same conduct which led to Scherer's dismissal. On appeal, Scherer may raise these grounds to support the judgment of the District Court and the Court of Appeals. They are alternative grounds for affirming the judgment below, and result in no greater relief than that awarded by the District Court and the Court of Appeals affirmance. Therefore these arguments are properly presented. *United States v. Raines*, 367 U.S. 17, 27 n. 7 (1960); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1960); *Barry v. Barchi*, 443 U.S. 55, 69 n. 1 (1978) (Brennan, J., concurring).

STATEMENT OF THE CASE

The Statements of the Case submitted by the defendants and the United States are accurate, but incomplete. Because they neglect to fully discuss important aspects of the proceedings below, we briefly address those omissions.

A. The District Court's Extensive Findings of Fact

No challenge has been made to the detailed findings of fact entered by the District Court. In its opinion, reported at 543 F.Supp.4 (N.D. Fla. 1982) (J.S. App. 1a-53a), the Court outlined the "conflict of interest" problem which led to Gregory Scott Scherer's dismissal from his career civil service position as a radio-teletype operator for the Florida Highway Patrol.

Scherer, relying on an initial letter of approval from his supervisor, accepted parttime employment as an Escambia County Sheriff's Reserve Deputy to guard the movie set for "Jaws II", then being filmed in Escambia County (Pensacola), Florida. 543 F.Supp. at 7-8 (J.S. App. 5a-6a).

Subsequently he was informed that his employment violated a Department policy on dual employment and that his outside job "might conflict with his duties as a radio operator . . .". *Id.*, at 8; 8a. However,

> No one ever identified the conflict to plaintiff; Wiggins [a supervisor] testified he didn't know what the conflict was.

Id.

The recommended sanction under the Department's disciplinary guidelines was a three day suspension. *Id.* But on October 25, 1977, Scherer received a letter of termination from the Director of the Florida Highway Patrol. The District Court found:

> At no time prior to the letter of termination was the plaintiff given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the official charged with making the termination decision, the defendant [Florida Highway Patrol Director] Beach. At no time prior to October 25, 1977, was the plaintiff notified of any right that he might have to respond to Col. Beach's letter of dismissal. There is no evidence of any affidavit or statement given or made to Beach or Davis [the Director of the State Department encompassing the Highway Patrol] which showed or purported to show that the plaintiff's outside employment conflicted in any manner with his duties as a radio-telephone operator . . . although the conflict has purportedly been identified by Beach's staff. In addition, the choice to dismiss rather than suspend Scherer is in violation of the Department's own disciplinary guidelines.
>
> *Id.* at 9; 9a-10a.

In addition, the District Court found that two other Florida Highway Patrol employees in Scherer's Troop were given approval to "work secondary employment as security personnel on the Universal Studio's set in

[neighboring] Santa Rosa County", and their approval was never revoked". *Id.*, at 8, n. 1; 54a.

Several months later, pursuant to Scherer's challenge to the Department's dual employment policy, a Florida Administrative Hearing Officer declared that the policy had not been validly adopted, and invalidated it. *Id.* at 9; 11a-12a.

Scherer, on November 10, 1977, filed for a hearing with the Florida Career Service Commission. The hearing was ultimately scheduled for August 4, 1978, over nine months after he had been terminated. Prior to the hearing a negotiated settlement was agreed upon, providing Scherer with reinstatement as of August 4, 1978, and approximately half of his lost back pay. *Id.* at 9-10; 12a-14a.[3]

The District Court found that after his October, 1977 dismissal and prior to his negotiated reinstatement, Scherer worked only odd jobs, was forced to borrow money, had personal property repossessed, lost weight, suffered a deterioration of physical and mental health,

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[3]Scherer's reinstatement was not easily accepted by his supervisors. The District Court detailed the work problems which ensued, leading to Scherer's eventual resignation from the Highway Patrol on January 13, 1979. The Court, although concluding Scherer's resignation waived any complaints about his subsequent treatment, was sympathetic about Scherer's post reinstatement treatment:

> Although there is no evidence that an order to "hard time" plaintiff came down the chain of command, . . . [his supervisors] apparently did exactly that.

Id., at 11; 20a.

avoided his friends "and was humiliated and embarrassed by his financial situation and his dealings with creditors". Ultimately he declared bankruptcy and was adjudicated bankrupt in 1980.

Id. at 10; 14a-15a.

Against that factual background, the District Court entered its initial conclusions of law and compensatory damage award against defendants Beach and Davis for $4200. *Id.* at 17; 51a.

B. The District Court's Initial Conclusions of Law

The District Court canvassed the applicable due process cases with a careful exposition of the principles growing from the *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) principle that "the opportunity to be heard" is the fundamental requirement of due process of law. *Id.* at 13-14, 30a-35a.[4] It concluded:

> With respect to Scherer's termination the procedures followed by defendants Beach and Davis were inadequate. The plaintiff did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination decision whether the

[4]The argument, advanced *infra*, presents the cases relied upon by the District Court and shows why they support both the applicable due process requirements and the no qualified immunity conclusion initially reached by that Court.

> pursuance of dual employment constituted cause for dismissal. Scherer was given written notice of dismissal along with notice of the stated reason. No effective opportunity to present oral or written argument to Ralph Davis or Col. Beach, the ultimate decision maker, was ever provided. Plaintiff was not offered the prompt hearing and prompt disposition of his appeal from the termination decision which is mandated by *Barry v. Barchi* and prior cases.

Id. at 14; 35-36a.

Then, in an equally careful analysis, the Court examined the applicable qualified immunity cases and concluded:

> That [qualified] immunity can be lost if the constitutional rights allegedly infringed by the defendants were "clearly established" at the time of the defendants' challenged conduct; if defendants knew or should have known of those rights and if they knew or should have known that their conduct violated the constitutional norm.

Id. at 16; 43-44a.

The District Court next re-examined the due process cases in light of that standard, and concluded:

> **Plaintiff Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the [Florida Highway Patrol] and defendants Beach and Davis, as**

> officials charged with the responsibility of making dismissal decisions for the Department of Highway Safety and Motor Vehicles, should have known that their failure to provide any pre-termination procedure violated plaintiff's constitutional rights.

Id. at 16; 46a.

Had the matter ended there, *Harlow v. Fitzgerald* would have counselled exactly what the District Court did—rejection of the qualified immunity claim. As we contend below, there was no need for the District Court to have retreated from its correct position, thus this case presents no conflict with *Harlow*, and the damage decision must be affirmed.

C. The District Court's Unnecessary Retreat

Shortly after issuing its opinion and judgment, the Fifth Circuit decided *Weisbrod v. Donigan*, 651 F.2d 334 (1981). The opinion rejected an attack on a Florida Civil Service termination by saying merely:

> As to the due process claims, Weisbrod offers no authority indicating the failure to hold a pretermination hearing and the delay in or the process of her administration were clear violations of her constitutional rights.

Id. at 336.

As we discuss in our argument, *infra*, the District Court felt it necessary to retreat from its prior, considered opinion, and conclude that *Weisbrod* stood for the

proposition that no clearly established constitutional provisions had been violated by defendants Beach and Davis. *Id.* at 19; 66a. Therefore it fell back upon the violation of a Departmental regulation requiring an administrative process resembling due process procedures, as its basis for rejecting the defendant's qualified immunity claim. *Id.* at 19; 67a.

The defendants and the Solicitor General now seize upon the District Court's amended rationale as a violation of *Harlow*. But as we set forth below, the issue they present is hollow, for the District Court need not have retreated in the face of *Weisbrod*, since its initial conclusions of law were correct.

SUMMARY OF ARGUMENT

I

The failure to provide Appellee Scherer with any opportunity to be heard between the time his supervisor recommended a three-day suspension and the Highway Patrol Director fired him, denied Scherer the clearly established right to due process of law to which he was entitled at the time of his termination. The District Court's initial holding to that effect was correct. Thus the damage award was consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

By 1972 this Court had established the due process right to be heard prior to the taking of a person's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). Government employees with entitlement to continued employment had a right to some kind of opportunity to be heard prior to their termination. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). The Fifth Circuit, which at the time encompassed Florida within its jurisdiction, had established the need for specific pre-termination due process in career service firings. *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978). The Florida Attorney General had participated as *amicus curiae* in that case, and had issued a 1975 Attorney General's Opinion confirming the State's commitment to due process for career service employees.

Thus, clearly established law required that before making the decision to fire Scherer, defendant Beach,

the Highway Patrol Director, and Davis, the Department of Highway and Motor Vehicles Director, should have provided him with an opportunity to be heard. Their failure to do so in light of clearly established principles vitiated their claim to qualified immunity. The 1981 Fifth Circuit decision in *Weisbrod v. Donigan*, 651 F.2d 334, provided no principled basis for retreating from the previously established due process requirements, nor, if it did sound some sort of retreat, should its 1981 emanations excuse constitutional misconduct which occurred in 1977.

Clearly established constitutional principles were also violated by firing Scherer while, at the same time, two other Highway Patrol officers were allowed to continue with their parttime employment in the same job which prompted Scherer's dismissal.

Therefore, the District Court's decision can be upheld without posing any *Harlow v. Fitzgerald* problem.

II.

Harlow v. Fitzgerald and its antecedents focus on the need to protect officials exercising discretionary functions from the chilling effect of damage suits.

In this case, the defendants were performing a non-discretionary duty to enforce a stated personnel policy. While they had discretion as to what, if any, sanction to impose, there was no discretion, once informed of a violation of Departmental regulations; a complete investigation had to be ordered as a prelude to making the termination decision.

Since the obligation to conduct a pre-termination inquiry was not discretionary, *Harlow's* concerns for government officials' decision making flexibility has no force in this case. Where, as here, established (as opposed to "clearly" established) constitutional doctrines are paralleled by state regulations providing similar due process protection, failure to follow both of the parallel courses constitutes "such disregard for established law that [the] conduct 'cannot reasonably be characterized as being in good faith' ". *Harlow*, 457 U.S. at 819 n. 33, quoting *Procunier v. Navarette*, 434 U.S. at 565.

This test would, like *Harlow*, obviate any need for determining subjective good faith, permitting the immunity issue for officials performing non-discretionary functions to be decided on summary judgment.

Since the damage award in this case is consistent with the proper test for determining qualified immunity in a non-discretionary setting, the decision below must be affirmed.

III.

The appellee agrees that there is no case or controversy with regard to the portion of the judgment declaring unconstitutional a 1981 statute concerned with career service post-termination proceedings. Therefore, that portion of the decision below should be vacated, and there is no authority under 28 U.S.C. §1254(2) to reach any other federal question presented by the defendants.

ARGUMENT

I

THE DEFENDANTS' TERMINATION OF GREGORY SCHERER'S EMPLOYMENT VIOLATED HIS CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS. THEREFORE THE AWARD OF DAMAGES IS CONSISTENT WITH *HARLOW V. FITZGERALD*, 457 U.S. 800 (1982).

Gregory Scott Scherer's Amended Complaint alleged that his termination from State employment violated his Fourteenth Amendment procedural due process rights because he was not accorded a prior hearing or a reasonably timed subsequent hearing (J.App. 12-16).

The District Court's initial opinion concluded that Scherer's constitutional right to "pre-termination procedures was clearly established" at the time of his discharge (J.S.App. at 30a-39a; 45a).

The Court vacated its due process decision in light of *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981), believing that case mandated a retreat from the constitutional basis originally asserted. The Amended Order utilized the violation of a Highway Patrol regulation as the basis for finding in favor of Scherer and awarding him damages (J.S.App. 69a-70a).

In response to the defendants' appeal to the Eleventh Circuit, Scherer continued to assert the validity of his federal due process claims. His Brief argued:

> The Defendants should have known that a mere post termination evidentiary hearing, without more, is insufficient.
>
> In 1972 the Supreme Court held that an employee who had an objective expectancy to continued employment had a right to a hearing prior to the termination of that employment.
>
> Appellee's Eleventh Circuit Brief, p. 31.

The defendants and the Solicitor General assume that the Eleventh Circuit's silent affirmance of the District Court permits the assumption that this case may only be viewed through the "violation of an administrative regulation" prism they present. That is not the case. The record, and the controlling legal principles, compel the conclusion that the defendants did violate Gregory Scott Scherer's clearly established constitutional rights and there is no immunity impediment to the $4200 damage award made by the District Court.

A. The Constitutional Due Process Principles Established at the Time of Scherer's Termination Required a Prior Hearing

Scherer was discharged in October, 1977. He had a protected property interest in his employment (J.App. 41). He was not provided formal pre-termination notice or an opportunity to complain (J.S. 7a-10a). By 1972, this Court had established the due process right to a hearing prior to the taking of one's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg*

v. Kelly, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969).

In the context of governmental employment, the Court had established that an employee with an entitlement to continued employment had a right to a hearing prior to the termination of that employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Roth's lesson was unambiguous: "When protected interests are implicated, the right to some kind of hearing is paramount". 408 U.S. at 506-07. A footnote to that statement underscored its firmness:

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." . . . "[T]he Due Process Clause . . . must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." . . . For the rare and extraordinary situation in which we have held that deprivation of a protected interest need not be preceeded by some kind of a hearing, see. . . .
>
> *Id.*, 408 U.S. at 570, n. 7. (emphasis in original; citations omitted).

The defendants may contend that the pre-termination conversations between Scherer and his immediate

superiors were sufficient. They would be wrong. The only meaningful moment for an opportunity to be heard would have been in the twelve days between October 12, 1977, when Scherer's supervisor recommended a three-day suspension (Plaintiff's Composite Exhibit 1, p. 106), and defendant Beach, on October 24, 1972, fired him. *Id.* at 107. The right to be heard offers meaningful protection only if one knows the loss which might be imposed. Although a sergeant and a lieutenant had suggested termination to the Troop Captain, *id.* at 97-98, the Captain's October 12 recommendation to Beach only put Scherer on notice of a three-day suspension. The due process cases focus on some right to be heard before facing a grievous loss. Only Beach could have provided that opportunity here, because he dictated the loss. Instead, he provided nothing except the letter telling Scherer he was fired. *Id.* at 107.

Matthews v. Eldridge, 424 U.S. 319 (1976), found due process to be satisfied where, prior to recommended termination of benefits, a disability claimant was "informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, . . . afforded an opportunity to review the medical reports and other evidence in the case file [and] respond in writing and submit additional evidence." *Id.* at 338.

In *Goss v. Lopez*, 419 U.S. 565 (1975), students suspended for 10 days were held to be constitutionally entitled to due process protection:

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge

> against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect.

Id., 419 U.S. at 583-84.

Florida state officials were not unaware of these legal principles. The Florida Attorney General was the named defendant in *Fuentes v. Shevin, supra.* He appeared as *amicus curiae* in *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978), in which the Jacksonville Florida Civil Service Board was held to this due process standard:

> Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include prior to termination written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.

Id., 531 F.2d at 1273 (footnotes omitted).

Thurston was consistent with the due process protections held to be sufficient in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a federal Civil Service case:

> The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§771.208 and 772.305; 5 U.S.C. §5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.

Id., 416 U.S. at 170 (Powell, J., concurring).

The Attorney General of Florida had stated his commitment to due process for State career service employees in a 1975 opinion:

> Career service employees who have attained permanent status in the career service system have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law.

Florida Attorney General's Opinions 075-94 (1975).

The Florida Highway Patrol September 1, 1977 Regulation which formed the basis of the District Court's Amended Judgment was a step in the due process direction mandated by the developed constitutional principles. It required:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.
>
> (J. S.App.69a).

Thus, the regulation was an attempt to make State action consonant with due process principles. Applied here, it would have put Scherer on *some* notice of the possible dire consequences facing him. In the context of this case, the Solicitor General's concern that official willingness to provide protections which exceed "current constitutional boundaries" may be "chill[ed]" (Brief of United States at 24), is without foundation. The regulation here endeavored to approach, not surpass clearly established constitutional law. The District Court could have properly rested its analysis on its initial opinion; reliance on the regulation was superfluous.

The District Court's deference to the then just decided *Weisbrod v. Doniga, supra*, which prompted its use of the Regulation, is difficult to explain. Weisbrod was fired from State employ after addressing a police officer with a profanity. She claimed both First Amendment and procedural due process protection. The former was rejected. The case's sole contribution to due process analysis is this sentence:

> As to the due process claims, *Weisbrod offers no authority* indicating the failure to hold a pretermination hearing and the delay in the process of her administrative appeal were clear violations of her constitutional rights.

Id., 651 F.2d at 336 (emphasis supplied).

The District Court must have simply felt obliged to follow the last opaque word from the appellate circuit. The Court grasped for some palatable explanation in light of *Thurston v. Dekle* and all the cases which had preceded that decision, none of which were even mentioned in *Weisbrod*. But, based solely on inferences drawn from *Weisbrod*'s passing references to due process, the District Court struck a new, non-constitutional course for its decision. That new tack was unnecessary. The clearly established constitutional route initially chosen by the Court (J.S.App.44a-46a) was well charted and need not have been discarded. Certainly, given the state of 1977 law, *Weisbrod*'s 1981 emanations should not have dictated the duties which were clearly owed to Scherer when he was fired in 1977. To conclude otherwise would allow public officials to escape constitutional duties by speculating on the future course of constitutional law: if Fourteenth Amendment

protections remain unchanged, or increase, the officials lose money; if those protections decrease, the officials profit by their prescience.

In October, 1977, Gregory Scott Scherer was constitutionally entitled to *some* prior opportunity to be heard. He received none. Therefore the defendants had no claim to immunity from damages under any construction of *Harlow v. Fitzgerald.*

B. The Constitutional Due Process Principles Established at the Time of Scherer's Termination Which Required a Subsequent Full Hearing Within a Reasonable Time of the Decision to Terminate His Employment, Underscored the Obligation to Provide Some Proper Pre-termination Protection.

The absence of *any* prior due process protection before being notified of his firing, combined with the 9 month delay in providing Scherer's opportunity for a subsequent hearing, makes the lack of pre-termination due process protection an inescapable violation of clearly established due process principles.[5]

Citing cases back to 1914, *Matthews v. Eldridge, supra*, said:

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[5]Scherer's case was not an exception. Testimony showed that from July, 1978 to February 1979, the average time between acceptance of an appeal and a civil service hearing ranged from 162.3 days (October, 1978) to 357 days (December, 1978). (ROA, Vol.4, Tr. at 14-18).

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

Id., 424 U.S. at 333.

By 1976 it was clear that the Constitution would not tolerate a serious delay in providing a due process hearing.

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), upheld a Louisiana sequestration statute against a prior hearing due process attack because, among other reasons, Louisiana law provided for an immediate post taking hearing. Justice Powell surveyed the pertinent due process protection offered by the Louisiana Statute, including its provision that

> An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

Id., 416 U.S. at 625 (Powell, J., concurring).

In *Arnett v. Kennedy, supra*, the Court approved an extensive pre-termination informal process, combined with a post-termination full hearing. The Court assumed that "some delay" always attends full use of formal hearing procedures, and found no specific due process fault with Kennedy's claim that over 50% of Civil Service Commission appeals were delayed "more than three months". *Id.*, 416 U.S. at 157-58. Kennedy had not attempted to pursue such an appeal, preferring instead

to sue first, *id.* at 138, therefore his case did not present a clear issue on the parameters of promptness.

Thus while there was some authority tolerating a three month delay in post-termination appeals from discharges which accorded sufficient pre-termination due process, there was no authority supporting a total denial of any pre-termination right to be heard, followed only by a post-termination hearing nine months later.

Thurston v. Dekle, supra, left no doubt about striking the proper balance. The *Thurston* court mandated pre-termination procedures in a process which promised a full Civil Service Board hearing within no more than 30 days of the employee's discharge. *Id.*, 531 F.2d at 1267, n. 2 and 3.

The 1978 decision in *Barry v. Barchi*, 443 U.S. 55, confirms the clearly established status of pre-1977 law on this subject. Finding no fault with New York's pre-suspension procedures, the Court relied solely on the general principal that an opportunity to be heard must be "at a meaningful time and in a meaningful manner" to conclude:

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state supervised horse racing.

> In these circumstances it was necessary that Barchi be assured a prompt post-suspension hearing, one that would proceed and be concluded without appreciable delay.

Id., 443 U.S. at 66.

The ease with which the Court arrived at the promptness requirement for *Barchi*, and the litany of pre-1977 due process cases which had articulated the need for a prior hearing, or the need for a speedy post-deprivation hearing combined with some pre-taking protections, leaves no doubt that clearly established due process rights were denied Scherer by the defendants' pre-termination failure to accord him "the right to some kind of prior hearing". *Board of Regents v. Roth*, *supra* at 569-570.

C. The Disparate Treatment of Gregory Scherer Violated His Clearly Established Constitutional Rights.

Scherer's Amended Complaint alleged his termination violated the Fourteenth Amendment by being arbitrary and capricious. (J.App.15-16). A joint stipulation reflected that two Florida Highway Patrol troopers in Scherer's Troop were also employed as security officers on movie sets, in addition to their Highway Patrol employment. The stipulation agreed that they, like Scherer, were subject to the same dual employment regulations and that they, like Scherer, requested and received initial approval to work on their second jobs. (J.App.64-65).

However, unlike Scherer, the "initial approval of that second employment which they [the two troopers] received was never revoked." *Id.* Therefore, they, unlike Scherer, were never terminated because of their dual employment. The District Court noted the irony, (J.S.App.54a), but did not render a judgment based on it.

This Court may uphold the judgment based on the undisputed factual record showing the denial of equal protection resulting from the disparate treatment of Scherer. This alternative equal protection ground, like the procedural due process claim, meets the clearly established constitutional right test of *Harlow.*

In 1969 the Fifth Circuit had condemned disparate treatment of similarly situated public employees. Addressing the University of Mississippi's efforts to curtail the dual employment of two law professors, the Court rejected the professors' claimed right to their outside work, but continued:

> Plaintiffs, however, do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class, i.e., members of the faculty of the University of Mississippi School of Law.
>
> *Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969).

Trister's equal protection lesson was reaffirmed in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), leading that Court to say in 1979 that the Circuit's constitutional

rule against disparate treatment was "firmly established". *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1979). While this trilogy involved public education, *Trister's* holding left no doubt that every state agency must subscribe to treating similarly situated persons in a similar fashion. Indeed, it is hard to find a more basic and accepted constitutional rule than the government's obligation to abide by that precept. *See, F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Therefore, since the disparate treatment of Scherer violated his clearly established constitutional right to equal protection, the damage award may be sustained on these alternative grounds for decision.[6]

[6]Beach and Davis are responsible for the equal protection violation since the claim arises from their termination of Scherer, not their approval of the other troopers' work. Moreover, the disparity of treatment underscores the need for Beach and Davis to have followed some due process pre-termination procedures, for doing so may have alerted them to their ultimate equal protection problem.

II

THE AWARD OF DAMAGES AGAINST THE DEFENDANTS WAS CONSISTENT WITH *HARLOW V. FITZGERALD*, 457 U.S. 800 (1982)

The *Harlow v. Fitzgerald* objective standard for determining qualified immunity is premised upon this balancing of societal interests:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences".

Id., 457 U.S. at 819 (citation and footnote omitted).

The concern for public officials' independence is tied to permitting such officials to freely exercise their discretionary judgment in performing their duties. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The briefs of the defendants and the United States disregard the discretionary-nondiscretionary distinction which is critical to any immunity analysis. From *Scheuer v. Rhodes*, 416 U.S. 232 (1974), through *Butz v. Economou* 438 U.S. 478

(1978), to *Harlow*, the Court has stressed the protection of discretion. *Harlow* adverted to the *Scheuer* acknowledgment that "high officials require greater protection than those with less complex discretionary responsibilities." *Id.*, 457 U.S. at 807. And *Harlow* quoted the *Butz* recognition of the "need to protect officials who are required to exercise their discretion . . ." *Id.* Thus, *Harlow* concludes:

> We therefore hold that government officials *performing discretionary functions generally are shielded* from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., 457 U.S. at 818 (emphasis supplied).

As we demonstrate below, the defendants here were (1) not performing a discretionary function, and (2) their violation of their own regulations requires the balancing test to be struck in favor of the public interest in deterring unlawful conduct.

A. The Defendants Were Not Engaged in Discretionary Duties

The ultimate decision as to what, if any sanction should have been imposed upon Scherer was an exercise of discretion. However, once informed of Scherer's violation of Department regulations, Beach's duty was ministerial. The pertinent personnel regulation provided:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations

> . . . , the Director *shall* order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason for such actions.
>
> (J.S. App. 69a) (emphasis supplied).

Therefore, before deciding to fire Scherer, Beach was obligated to order a complete investigation.

This case does not involve Presidential aides making decisions in unstructured situations (*Harlow*); state officials formulating important policies within a broad range of discretion (*Scheuer*, at 274); federal officials deciding whether to institute an investigation and administrative proceedings (*Butz*, at 480); school board members "weighing . . . many factors and formulating long term policy" (*Wood v. Strickland*, 420 U.S. 308, 319 (1975)); or regional planning board members acting in a legislative-like capacity (*Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)).

This case involves merely an official's action enforcing an established policy. Indeed, given an official's duty and obligation to follow mandatory agency policy, defendant Beach had no discretion or choice—he had to seek a complete investigation *after* receiving the report of Scherer's conduct. Instead, he relied upon the

informal and unedifying discussions which occurred prior to the Troop Captain's October 12, 1977 memorandum to him.[7]

Thus, unlike *Harlow* and its antecedents, the question here is whether government officials performing mandatory, non-discretionary functions are shielded from liability for civil damages insofar as their conduct violates established rights which a reasonable official would have known. The answer must be "no".

B. The Defendant's Failure to Accord Any Pre-Termination Opportunity to be Heard Was Unreasonable in Light of the Departmental Regulation Which Attempted to Offer Some Pre-Termination Due Process Protection

Once concern for inhibiting discretionary conduct is removed, deterring unlawful conduct and protecting established rights become paramount interests in the immunity analysis.

As posed by the District Court, the question was whether, having violated a Departmental regulation providing some due process, could the defendants' denial of any due process be reasonable. (J.S.App. 70a). That test, like *Harlow's*, focused upon objective legal reasonableness, and is consistent with *Harlow's* statement

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[7]As the District Court found, even Scherer's supervisor, Lt. Wiggins, did not know what conflict was posed by Scherer's dual employment. (J.S. App. 9a). Had Beach followed his duty, and ordered an investigation subsequent to receiving the Captain's report, that problem and the fact of the disparate treatment of Scherer, might have resulted in the imposition of a lesser sanction.

that "where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . .", 457 U.S. at 819. Indeed, *Harlow's* footnote to its hesitation doctrine provides strong support for our position. Quoting favorably from *Procunier v. Navarette*, 434 U.S. [555] at 565 [1978], the Court left open the possibility that even if a constitutional right had not been declared, clear "disregard for established law" could lead to a conclusion of unreasonableness and bad faith, thus allowing damages.[8]

In the instant case, the defendants did act in clear disregard of law established by their own regulations. The Solicitor General's expressed concern for a possible return to a pre-*Harlow* need for "an extensive analysis of the state of mind of the offending public official", or reliance upon regulations which may be "irrelevant to the wrong for which the plaintiff seeks redress", (Brief for United States at 18-19) has no force here.

To be sure, the inquiry is slightly broader than the defendants' and the Solicitor General's interpretation of *Harlow*, but that is only because we are dealing with officials who are *not exercising discretion*. Accordingly,

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[8] *See, Harlow*, 457 U.S. at 819, n. 33:

> cf. *Procunier v. Navarette, supra*, 434 U.S. at 565, quoting *Wood v. Strickland*, 420 U.S. at 322, ("Because they could not reasonably have been expected to be aware of a constitutional right that had not been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.' ").

adopting *arguendo* the construct of the defendants, the appropriate inquiry would be modified only slightly:

> (1) Were the officials performing discretionary or non-discretionary actions?
>
> (2) Were the plaintiff's constitutional rights clearly established at the time the defendant's action occurred? [If the answer is yes, there is no immunity for either discretionary or non-discretionary actions.]
>
> (3) If the officials were performing non-discretionary actions, and plaintiff's constitutional rights were not *clearly* established, did the official violate known statutes or regulations designed to protect constitutional interests, thus rendering his conduct unreasonable?[9]

Although not setting its inquiry out in the way we have fashioned it, the District Court did use that analysis. In doing so, it remained faithful to the balancing of interests which form the foundation of the qualified immunity rules and kept faith with an objective test which *Harlow* designed in order to permit qualified immunity claims to be decided on summary judgment. *Harlow*, 457 U.S. at 818. While this case, having been decided pre-*Harlow*, could not have benefited from its Rule 56, Fed.R.Civ.P., lesson, future cases will be able to use violations of relevant statutes and regulations

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[9]Implicit in this inquiry of course is the existence of a constitutional principle, for the §1983 damage relief is aimed at violations of federal, not state law.

to decide on summary judgment whether offending officials, performing non-discretionary actions, showed "such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith' ". *Harlow, supra* at n. 33, *Procunier v. Navarette, supra.*[10]

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[10]The defendants' attempts to minimize their violation of the regulation (Brief for Defendants at 58,n. 16) are without merit.

First, the Regulation (J.S.App.69a) would have provided Scherer with a chance to respond in light of knowledge that he faced serious consequences. The memorandum to Beach which led to termination recommended a "three day" suspension. Plaintiff's Composite Exhibit 1, p. 106. It did not include any response from Scherer. The Regulation provided: "The completed investigation will also contain a written statement made by the employee against whom the complaint was made." (J.S.App.69a). Scherer's brief comment that he saw no conflict was transmitted to Beach *after* the memorandum recommending a three day suspension had been sent, Composite Exhibit at 100, 102. Had Beach, following the Regulation, ordered a complete investigation *after* receiving a reported violation, Scherer could have enlarged his no conflict defense and raised the issues caused by the permission given to two other Troopers to undertake similar employment. Instead of ordering an investigation, Beach fired Scherer.

Second, defendants' claim that the Regulation was invalid under Florida law because it was not properly promulgated does not excuse their non-compliance with its provisions. Until challenged, they were bound to its strictures, just as they forced Scherer's compliance with the dual employment policy, even though that was later found to be invalidly promulgated. (J.S.App.11a).

III

THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO THE PORTION OF THE JUDGMENT DECLARING FLORIDA STATUTE §110.309 (1981) UNCONSTITUTIONAL

We have agreed at p. 1, *supra*, that the Court should vacate the portion of the District Court judgment declaring unconstitutional a Florida Civil Service statute which was enacted after Scherer had resigned from state service.

The District Court originally declared unconstitutional §110.061, Fla.Stat. (1977), because it failed to guarantee prompt post-termination hearings (J.S.App.50a). Scherer's rights had been determined pursuant to that statute.

The Amended Order reflected the Court's knowledge of the repeal of §110.061, (J.S.App.73a), but, presumably because its successor (§110.309(1981)) contained the same language, it was declared to be unconstitutional for the same reasons. Apparently the defendants had no objection, since their Eleventh Circuit Brief, at 39-40, n. 13, sought to defend both the old and new statutes, "since the wording is substantially the same."

However, Scherer could not, unless he re-enters state service, be affected by the 1981 statute. He had resigned in 1979, two years before its enactment. Therefore he had no controversy with regard to the 1981 statute at the time declaratory relief was given. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). Nor were

any of the possible exceptions to the mootness doctrine present here, which would have permitted a declaratory judgment despite Scherer's lack of interest in the 1981 statute. cf. *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

Scherer had a controversy with regard to the 1977 predecessor statute. To the extent that the District Court's original opinion declared it unconstitutional, and its successor suffers the same language, Florida officials should be on notice of their potential exposure to suit. But since the continuing controversy here involves damages arising from the lack of pre-termination due process, the repeal of the 1977 statute makes it unnecessary to address its validity.

For those reasons the Court should vacate the portion of the judgment declaring invalid §110.309, Fla.Stat. (1981).

CONCLUSION

The defendants violated Gregory Scott Scherer's clearly established constitutional rights by failing to provide him with any opportunity to be heard before his termination. Therefore the defendants cannot lay claim to any qualified immunity and the $4200 damage award must be affirmed.

If, in 1977, clearly established constitutional rights did not require some kind of an opportunity to be heard before termination of a career state employee, the combination of established constitutional law and clear violation of an administrative regulation seeking to protect an employee's due process rights, rendered these defendants liable in damages for their unreasonable violation of established rights.

In either event, the damage portion of the judgment below should be affirmed.

Respectfully submitted,

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